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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Appellant,

v.

GABRIEL MICHAEL LOYA,

Defendant and Respondent.

E053870

(Super.Ct.No. RIF10001310)

OPINION

APPEAL from the Superior Court of Riverside County. Helios (Joe) Hernandez,
Judge. Reversed with directions.

Paul E. Zellerbach, District Attorney and Matt Reilly, Deputy District Attorney for
Plaintiff and Appellant.

Denise M. Rudasill, under appointment by the Court of Appeal, for Defendant and
Respondent.

Gabriel Michael Loya pled guilty to separate counts of possessing marijuana while incarcerated at California Rehabilitation Center (CRC)¹ and admitted an allegation under the Strikes law, pursuant to an indicated sentence by the court. Over the People's objection, the court indicated it would order the terms for the two new offenses to run consecutive to the term he was serving at CRC, and it would calculate the term for both offenses at one-third the midterm. The defendant was sentenced as the court had indicated, and was awarded presentence credits to defendant. The People appealed.

On appeal, the People assert that the indicated sentence was unauthorized. In their supplemental briefs submitted at our request, the People argue defendant was not entitled to presentence credits against his term, while defendant argues that the record is ambiguous as to whether he had been paroled prior to sentencing. We reverse and remand to the lower court for further proceedings.

BACKGROUND

On April 7, 2009, a correctional officer working at CRC observed defendant standing near his locker rolling something in a piece of paper. The correctional officer approached defendant and instructed defendant to hand over the paper, which was found to hold a leafy substance resembling tobacco. After the officer confiscated the paper and its contents, he examined it more closely and suspected that the paper contained marijuana. The material tested positive for marijuana.

¹ Defendant was serving a sentence at CRC; he was not committed to CRC pursuant to an addiction proceeding. (Welf. & Inst. Code, § 3050 et seq.)

Defendant was charged in case No. RIF10001310 with possessing marijuana while in CRC, in violation of Penal Code section 4573.6. It was further alleged he had previously been convicted of a serious or violent felony under the Strikes law. (Pen. Code, §§ 667, subds. (c), (e)(1), 1170.1, subd. (c)(1).)

On March 16, 2010, defendant was detained by correctional officers who observed him chewing on something. One officer was instructed to escort defendant to the facility program office. En route, defendant spit out what was suspected to be marijuana. The escort officer took possession of the material defendant had spit out and conducted a test on it, confirming that the material was marijuana.

Defendant was charged with one count of possessing marijuana in CRC (Pen. Code, § 4573.6), and with a special allegation under the Strikes law, in case No. RIF10002355. (Pen. Code, §§ 667, subd. (e)(1), 1170.12, subd. (c)(1).) An amended information charged defendant with one count of violating Penal Code section 4573.6, and one count of violating Penal Code section 4573.8, along with the Strikes law allegation. The two cases were consolidated for trial.

At the time of trial, the court indicated it would sentence defendant to 40 months, by imposing “one-third the midterm, consecutive, doubled.” Defendant pled guilty to counts 1 (Pen. Code, § 4573.6), and 2 (Pen. Code, § 4573.8), and admitted the Strike allegation. The change of plea form, which was not signed by the prosecutor, specified a sentence of 40 months in state prison.

On April 22, 2011, defendant was sentenced in accordance with the indicated sentence. The court imposed one-third the middle term (three years, divided by three, equals one year) on count 1, which, when doubled, resulted in a term of two years for count 1. The court imposed a consecutive sentence calculated as one-third the midterm of two years (eight months), which, when doubled, resulted in a term of one year four months for count 2. The total term imposed was three years four months. The court awarded defendant presentence custody credit of 121 days actually served, plus 60 days of conduct credit for total presentence credit of 181 days.² The People appealed.

DISCUSSION

1. The Indicated Sentence Was Unauthorized.

On appeal, the People challenge the sentence imposed by the trial court as an unauthorized sentence. The People argue that the trial court improperly treated both of the current offenses as subordinate to the original carjacking sentence which the defendant was serving at the time of the commission of the new crimes. We agree.

Penal Code section 1170.1, subdivision (c), provides in relevant part, “In the case of any person convicted of one or more felonies committed while the person is confined in a state prison or is subject to reimprisonment for escape from custody and the law either requires the terms to be served consecutively or the court imposes consecutive

² The court had previously assumed defendant was paroled on December 23, 2010. However, at the sentencing hearing, the People informed the court that defendant’s actual parole date was May 22, 2011.

terms, the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison.”

In construing Penal Code section 1170.1, subdivision (c), we must try to give effect to every phrase and paragraph, leaving no part of the statute useless or deprived of meaning. (*People v. McCart* (1982) 32 Cal.3d 338, 342.) The general “punitive purpose” of the sentencing rules is to assure that prison terms are “proportionate to the seriousness of the offense and uniform among persons committing the same offense under similar circumstances. (§ 1170, subd. (a), par. (1).)” (*Id.* at p. 340.) The manifest purpose of subdivision (c) is to accord different and more severe punishment to those convicted of felonies while confined in a state prison, to protect the public from recidivist offenders and promote the safety of correctional officers. (*People v. White* (1988) 202 Cal.App.3d 862, 869.) When an in-prison offense is imposed consecutively, it is fully consecutive to the offense for which the defendant was imprisoned. (*People v. Holdsworth* (1988) 199 Cal.App.3d 253, 256.)

Penal Code section 1170.1, subdivision (c) requires imposition of a single aggregate sentence for multiple in-prison offenses, even if the offenses and convictions occurred several years apart. (*People v. Venegas* (1994) 25 Cal.App.4th 1731, 1743.) In other words, the first in-prison offense is treated as a new principal term rather than as a subordinate term to the out-of-prison offense. (*People v. McCart, supra*, 32 Cal.3d 338, 344.) Subsequent in-prison offenses are treated as subordinate, reduced according to the

one-third base term formula where consecutive sentences are imposed for multiple in-prison offenses. (*Id.* at pp. 345-346; *Venegas*, at pp. 1742-1743.)

The interpretation expressed in the foregoing authorities relates to *all* felonies committed by a person serving a prison sentence, as well as persons subject to recommitment following an escape. Under Penal Code section 1170.1, subdivision (c), a term for a single in-prison offense or multiple in-prison offenses begins to run at the end of the prison term imposed for the original out-of-prison offenses. (*In re Tate* (2006) 135 Cal.App.4th 756, 764-765.) The term for an in-prison offense does not become part of the aggregate prison term imposed for those offenses which were committed “on the outside.” (*People v. White, supra*, 202 Cal.App.3d at p. 870.) “[C]onsecutive sentences imposed for additional crimes *committed in prison* are deemed to commence when the prison would otherwise have been released.” (*People v. Langston* (2004) 33 Cal.4th 1237, 1242 [italics in original].)

In calculating sentence terms for crimes committed in prison, a “box theory” is used. (*People v. White, supra*, 202 Cal.App.3d at p. 870.) In the first box, the defendant is imprisoned for a total term consisting of the sum of his original aggregate sentence computed under Penal Code section 1170.1, subdivision (a) (the outside offenses). In the second box, a new aggregate term is imposed under Penal Code section 1170.1, subdivision (c), for the offenses committed while imprisoned. (*People v. White, supra*, 202 Cal.App.3d at p. 870, citing *People v. McCart, supra*, 32 Cal.3d at p. 340.) The latter term starts to run at the end of the prison term imposed for the defendant’s original

“outside” offense. (*White*, at p. 870; *McCart*, at p. 340.) The total term is computed by adding the total of the two boxes together. (*White*, at p. 870.)

In *McCart, supra*, the defendant was serving a prison term when he committed his first in-prison offense. He was sentenced on the in-prison offense and the term for the in-prison crime was ordered to run consecutive to the original sentence. Then the defendant committed a second in-prison offense, for which he was convicted and sentenced to a term that was ordered to run consecutive to the previous term. The California Supreme Court held that Penal Code section 1170.1, subdivision (c) called for computation of a single term of imprisonment for all convictions of felonies committed in prison and sentenced consecutively, whether multiple convictions occur in the same court proceeding or in different proceedings. (*People v. McCart, supra*, 32 Cal.3d at p. 343.) It further held that the new (aggregate) term is to be fully consecutive to the term already being served: i.e., that it must commence at the end of the longest of the prisoner’s previously imposed terms. (*Ibid.*)

In computing the indicated sentence here, the trial court misconstrued Penal Code section 1170.1, subdivision (c) and treated both in-prison offenses as subordinate to the original “outside” offense. Although one of the in-prison terms was properly ordered to run consecutive to the term for the other in-prison crime as a subordinate term, it seems clear that the Legislature intended that aggregate sentence for the in-prison offenses, sentenced consecutively, should begin to run from the expiration of the prior term for the

outside offenses. (*In re Curl* (1983) 149 Cal.App.3d 236, 240.) Remand for resentencing is required.³

2. The Record Is Unclear As to Whether Defendant Was Entitled to Presentence Custody Credit.

The trial court awarded custody credits to the defendant based on the assumption that defendant was paroled in December 2010, a few months before the sentence on the in-prison offenses. However, the People informed the court that the defendant's actual parole date was May 22, 2011, one month after the sentencing hearing.

We asked the parties to provide simultaneous supplemental briefing on the question of whether the defendant was entitled to custody credits pursuant to *In re Rojas* (1979) 23 Cal.3d 152, 155-157.) The People argue that defendant was not on parole at the time of sentencing, although they acknowledge the record is unclear on this point. Defendant acknowledges that because the record is unclear as to his status at the time of sentencing, arguing we should adopt the interpretation that favors him, or refer the matter back to the trial court with directions to hold a hearing to determine the correct parole

³ Where a defendant pleads guilty following an indicated sentence, he or she may reserve the right to withdraw his plea and go to trial in the event the court determines that the facts recited are not confirmed in a fashion which enables it to sentence the defendant in accord with the condition. (*People v. Superior Court (Felmann)* (1976) 59 Cal.App.3d 270, 276.) Penal Code section 1192.5 authorizes a guilty plea may specify the punishment, and specifies that if the court withdraws its approval, the defendant may withdraw his plea. We treat the trial court's unauthorized indicated sentence as a withdrawal of its approval of that sentence. On remand, defendant may seek to withdraw his plea.

date. We remand the matter for a determination of whether or not the defendant had been paroled in December, 2010.

Subdivision (d) of Penal Code section 2900.5 provides that it is the “duty of the court imposing the sentence to determine the date or dates of any admission to, and release from, custody prior to sentencing and the total number of days to be credited pursuant to this section. The total number of days to be credited shall be contained in the abstract of judgment provided for in Section 1213.” The intent of this provision is to assign the task of resolving factual and legal disputes to the sentencing court and to insure an adequate record for appellate review and administrative application. (*People v. Blunt* (1986) 186 Cal.App.3d 1594, 1601.)

A failure to accurately award custody credits results in an unauthorized sentence, subject to correction at any time. (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1140; *People v. Jack* (1989) 213 Cal.App.3d 913, 916-917.) Where the record is unclear whether the defendant was serving a sentence at the time he was sentenced, the court should conduct an evidentiary hearing to determine if the defendant is entitled to presentence custody credits. (*In re Williams* (2000) 83 Cal.App.4th 936, 942-943.) On remand, we direct the court to conduct such a hearing to determine the defendant’s actual parole date, in order to determine if he was eligible for custody credits.

3. The Abstract of Judgment Should Be Amended.

The abstract of judgment reflects the terms imposed by the court for counts 1 and 2 on the front page. Line 4 of the Judicial Council Form contains a box to be checked by

the court clerk to indicate if the defendant was sentenced under the Strikes law. That box is unchecked.

On the back side of the form, line 11 includes a space for “Other orders.” On this line, the clerk has indicated that defendant was sentenced pursuant to Penal Code section 667, subdivision (e)(1), referring to the Strikes law.

The abstract of judgment constitutes the commitment and is the order sending the defendant to prison, and the process and authority for carrying the judgment and sentence into effect; no other warrant or authority is necessary to justify or require its execution. (Pen. Code, § 1213; *People v. Mitchell* (2001) 26 Cal.4th 181, 185, citing *In re Black* (1967) 66 Cal.2d 881, 890.) It goes without saying that accuracy is essential in a document that prescribes the execution of sentence and is provided to Criminal Investigation and Identification. (Pen. Code, § 1213, subd. (a).)

This court has the authority to correct clerical errors at any time. (*People v. Mitchell, supra*, 26 Cal.4th at pp. 186-187.) The clerk is directed to amend the abstract of judgment to reflect that the sentence was imposed under the Strikes law by checking the box on line 4, and to delete the “other orders” under line 11.

DISPOSITION

The sentence is reversed and the matter remanded to the trial court for further proceedings in accordance with the views expressed in this opinion.

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RAMIREZ
P.J.

We concur:

RICHLI
J.

CODRINGTON
J.